

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1401-CR

Cir. Ct. No. 2012CT12

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID LAWRENCE EASTMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County:
JOHN P. ANDERSON, Judge. *Affirmed.*

¶1 MANGERSON, J.¹ David Eastman appeals a judgment of conviction for operating while intoxicated, third offense. Eastman argues the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

circuit court erred by denying his suppression motion because the officer lacked reasonable suspicion to stop his vehicle. We affirm.

BACKGROUND

¶2 The following facts are undisputed. On January 15, 2012, officer Will Stoychoff was on patrol when he observed a vehicle in a ditch off the right shoulder of County Highway A in Bayfield County. Stoychoff stopped, but found no driver or passengers. Stoychoff left the scene and attempted to locate the driver and any passengers. Approximately fifty minutes later, Stoychoff returned to the scene and observed that the vehicle had been pulled from the ditch by a group of people and was “driving away.” Stoychoff stopped the vehicle, and Eastman was driving. Eastman was ultimately arrested for, and charged with, operating while intoxicated.

¶3 Eastman moved to suppress evidence, arguing Stoychoff lacked reasonable suspicion to stop his vehicle. Eastman asserted Stoychoff lacked reasonable suspicion because Stoychoff never saw the vehicle being pulled from the ditch and only observed the vehicle driving away. He argued there was nothing illegal about having his car in the ditch and there was no evidence of bad driving.

¶4 The circuit court denied Eastman’s motion. It emphasized that Eastman’s vehicle was not merely parked on the side of the road—rather, it was in a ditch. It concluded that, after Stoychoff observed the vehicle in the ditch, Stoychoff had reasonable suspicion to believe some crime or traffic violation had occurred.

¶5 Eastman moved for reconsideration, and the court denied his motion. Eastman then pleaded no contest to operating while intoxicated, and the court found him guilty. He appeals.

DISCUSSION

¶6 A police officer may conduct a traffic stop when the officer has grounds to “reasonably suspect that a crime or traffic violation has been or will be committed.” *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Whether there is reasonable suspicion is a question of constitutional fact. *Id.*, ¶10. We uphold the circuit court’s factual findings unless they are clearly erroneous; however, we independently apply those facts to constitutional principles. *Id.*

¶7 Reasonable suspicion exists when, under the totality of the circumstances, the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime or traffic violation. *Id.*, ¶23. “Such a stop must be based on more than an officer’s ‘inchoate and unparticularized suspicion or hunch.’” *Id.* Instead, the officer “‘must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.* (citation omitted).

¶8 On appeal, Eastman argues the mere fact that his car was in a ditch did not give rise to reasonable suspicion that *criminal* activity was afoot. He asserts there is no case law that provides support for that proposition. Eastman also contends Stoychoff had no reason to offer assistance under the community caretaker exception because there was no indication that emergency aid was needed.

¶9 The State responds that an officer may stop a vehicle if the officer has reasonable suspicion that a criminal or *traffic* violation has occurred. *See id.* It contends that, in this case, Stoychoff’s observation of Eastman’s vehicle in a ditch gave Stoychoff reasonable suspicion to believe a traffic violation, such as reckless, negligent, or inattentive driving, had occurred. Relying on *State v. Griffin*, 183 Wis. 2d 327, 333, 515 N.W.2d 535 (Ct. App. 1994), the State argues that, although Eastman may have had an innocent explanation for why his vehicle was in the ditch, Stoychoff was not required to rule out any innocent inferences before stopping Eastman’s vehicle.

¶10 Eastman did not file a reply brief in response to the State’s arguments. We therefore deem conceded the State’s argument that Stoychoff had reasonable suspicion to stop Eastman’s vehicle based on a *traffic* violation. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

¶11 In any event, we also conclude Stoychoff had reasonable suspicion to stop Eastman’s vehicle. Contrary to Eastman’s assertion, there is no requirement that an officer needs reasonable suspicion of a crime before the officer may stop a vehicle. Rather, it is well-settled that “an officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation.” *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394.

¶12 Here, Stoychoff observed a vehicle in a ditch off a county highway in winter. A vehicle ordinarily does not go off a highway and end up in a ditch unless something is amiss. It is reasonable to infer that the vehicle ended up in the ditch because the driver committed a traffic violation, such as: deviating from the

designated lane, contrary to WIS. STAT. § 346.13(3);² driving too fast for conditions, contrary to WIS. STAT. § 346.57(2);³ inattentive driving, contrary to WIS. STAT. § 346.89(1);⁴ or negligent operation of a motor vehicle, contrary to WIS. STAT. § 346.62.⁵ Although Eastman may have had an innocent explanation for why he ended up in the ditch, we agree with the State that Stoychoff was not required to rule out any supposedly innocent explanation for Eastman's conduct before initiating the stop. *See Griffin*, 183 Wis. 2d at 333. When Stoychoff saw the vehicle in the ditch, he had reasonable suspicion to believe the driver committed a traffic violation. We conclude the stop was lawful.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

² WISCONSIN STAT. § 346.13(3) provides that “when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated.”

³ WISCONSIN STAT. § 346.57(2) provides:

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. The speed of a vehicle shall be so controlled as may be necessary to avoid colliding with any object, person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and using due care.

⁴ WISCONSIN STAT. § 346.89(1) provides: “No person while driving a motor vehicle shall be so engaged or occupied as to interfere with the safe driving of such vehicle.”

⁵ WISCONSIN STAT. § 346.89(2) provides: “No person may endanger the safety of any person or property by the negligent operation of a vehicle.”

